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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No._____

RAY TAMARGO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

FROM THE UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI
CRIMINAL CASE

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Questions Presented for Review:

May the United States Government accuse, prosecute, and convict for a crime based upon regulations promulgated under a statute, which had been previously repealed? Specifically, may a criminal defendant be convicted for failure to meet a training standard of "continuous and timely job instruction," [a standard designed for use under the Manpower Development Training Act (MDTA) which was repealed prior to the date of the alleged crime] when the Comprehensive Employment Training Act (CETA) under which the contract was authorized, required only "demonstration and practice."

Parties to the Proceeding:

The charges in this case were brought by the Department of Justice of the United States Government. The Defendants were Ray Tamargo, Angelo Cannata, and Linda Gail Bowling Scott.

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PETITION FOR WRIT OF CERTIORARI
CRIMINAL CASE

Opinion Below

The Opinion of the United States Court of Appeals, Fifth Circuit, below (Appendix A, *infra*) is reported at 637 F.2d 346.

A jury verdict was rendered below and judgment and commitment entered by the United States District Court for the Middle District of Florida, Tampa Division, on January 18, 1980. (Judgment and Probation/Commitment Order, Appendix B, *infra.*)

Jurisdictional Statement

The Judgment of the United States Court of Appeals, Fifth Circuit, (Appendix A, *infra*) was entered on February 17, 1981.

On March 3, 1981, a Petition for Rehearing was filed and, on March 19, 1981, an Order entered denying the Petition for Rehearing.

The jurisdiction of this Court is invoked under 28 USC §1254(1).

Statutes and Regulations Involved

1. 29 C.F.R. 20.20, 1967: MDTA STANDARD
   See: Appendix D.
2. 29 C.F.R. 95.33(d)(2)(i): CETA STANDARD
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3. 18 U.S.C. §§2 (1951) and 1341 (1970):
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5. 29 U.S.C. §801 (1978): CETA
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6. 29 U.S.C. §811(4) (1973): CETA
   See: Appendix I.
7. 42 U.S.C. §2571 (1965): MDTA
   See: Appendix J.
8. 42 U.S.C. §2584(a) and (b) (1962): MDTA
   See: Appendix K.

Statement of the Case

In 1973, the Congress enacted the Comprehensive Employment Training Act (CETA) which provided for job training and employment opportunities for economically disadvantaged, unemployed, and under-employed persons. The purposes of the Act, which were to be accomplished by establishment of a flexible, decentralized system of Federal, State, and local programs, were accomplished by six Titles, as follows:

(1) Title I — Comprehensive Manpower Services.
(2) Title II — Public Service Employment Programs.
(3) Title III — Special Federal Responsibility encompassing programs for Special Target Groups and Research, Training, and Evaluation.
(4) Title IV — Job Corps.
(5) Title V — National Commission for Manpower Policy.
(6) Title VI — Emergency Job Programs.

[29 U.S.C. §§801 - 966, 1973].

The law enacting the CETA program, Public Law 93-203, repealed 42 USC 2584, the Manpower Development Training Act of 19[illegible] (copy appended as Appendix K, *Infra*), a predecessor government-assisted training program.

Under CETA, the Tampa Concentrated Employment Program (TCEP) was established. The primary goal of TCEP was to seek out employers with which to place individuals seeking on-the-job training and employment opportunities.

Spigrin, Inc., a Florida corporation partially owned by the Defendant Tamargo and several other persons was one of the employers chosen to participate in the TCEP on-the-job training program (OJT). This corporation operated eleven (11) bars

located within the City of Tampa. The jobs for which the on-the-job training program ultimately was to be utilized included managers, assistant managers, bar attendants, carpenters and accounting clerks.

In 1979, at the trial before the United States District Court for the Middle District of Florida, Defendant Tamargo and Co-Defendants, Angelo Cannata and Linda Gail Bowling Scott, were accused of willfully and knowingly combining, conspiring, confederating, and agreeing with each other to defraud the United States by causing payments to be made under the Comprehensive Employment Training Act of 1973, Title 29, United States Code, §§801 - 993 (CETA), for services which were not proper and necessary for the operation of the Tampa Comprehensive Employment Program, in violation of Title 18, United States Code, §371. (Count 1)

The United States further accused Defendant Tamargo of mail fraud for knowingly causing six (6) warrants distributing funds, which were the subject of a grant received pursuant to CETA, to be transmitted by the United States Postal Service in violation of Title 18, United States Code §§2 and 1341. (Copy appended as Appendix F, *Infra*) (Counts 4-9)

Finally, the United States charged Defendant Tamargo and Co-Defendant Bowling with aiding and abetting Co-Defendant Cannata in the willful and knowing misapplication of funds, consisting of the above-mentioned warrants, in violation of Title 18, United States Code, §§2 and 665(a). (Copy appended as Appendices F and G, *Infra*) (Counts 10-15) The Government contended throughout the trial that Tamargo did not provide "continuous and timely job instruction" for CETA-sponsored employees.

The jury was unable to come to agreement as to Count 1 and a mistrial was ordered as to each Defendant. The District

Court subsequently granted the Government's Motion for Dismissal of Count 1. The jury found against Defendant Tamargo on Counts 4 through 15 and, on January 18, 1980, the District Court entered a judgment and commitment order thereon and sentenced Defendant Tamargo.

On that same date, a Notice of Appeal to the United States Court of Appeals for the Fifth Circuit (Appellate Court) was filed for all Defendants. The appeal, in which Defendant Tamargo requested either a retrial or judgment of acquittal, was heard on October 28, 1980, and, on February 17, 1981, the Appellate Court affirmed the commitment of Tamargo. *United States of America v. Tamargo, et al.*, 637 F.2d 346 (5th Cir. 1981).

A Petition for Rehearing was filed on March 2, 1981, and, on March 19, 1981, the Appellate Court entered an Order denying the Petition for Rehearing.

Argument

The Fifth Circuit Court of Appeals has committed gross error by refusing to address or even comment on the presumably unintentional mistake of the Justice Department in its incredibly fallacious pursuit of Defendant Tamargo on a nonexistent training requirement which resulted in witnesses' confusion and subsequent false testimony. To allow a conviction to stand based upon this gross error would be a miscarriage of justice in the truest sense. Specifically, the crux of this Petition for Writ of Certiorari is the Government's wrongful charge of non-compliance with an invalid training standard.

To truly understand the type of fraud this case is supposed to have involved, it is critical to understand the type of fraud this case did *not* involve.

This case did not involve payments to Spigrin for nonexistent persons.

This case did not involve payments to Spigrin for persons who existed but who did not work for Spigrin.

This case did not concern kickbacks from Spigrin to Cannata.

This case did not involve a fraudulent description of the jobs to be done for Spigrin.

In short, this case did not contain a single element of what typically would be thought of as fraud.

What this case did involve was the claim by the Government that Defendant Tamargo did not provide continuous and timely job instruction—a standard of training not required under CETA.

At the trial, as the basis for the misapplication charge, the prosecution placed heavy emphasis on the need for "continuous and timely training." An accusation based upon non-compliance with this training standard, however, is totally fallacious.

The basis for the error was that the Spigrin contract for OJT was drawn up on an outdated MDTA form — outdated because MDTA had been repealed. In 1975, when Tamargo signed the contract with TCEP, the contract form used was one entitled "MDTA-OJT Proposal - Short Form." Further, the form was promulgated in 1972. Obviously, because the program was under CETA (not MDTA), and CETA was enacted in 1973, the form was inappropriate. However, the form was, in fact, used, and later served as the basis of the Government's case against Tamargo. The boilerplate "fine print" of the form required a training standard of "continuous and timely job instruction." (Copy appended as Appendix C, *infra.*) Unfortunately, the Court and the Defense Counsel at the District Court level were unaware that (1) the form was outdated and (2) the training standard had been changed. The Government, however, had been pursuing this case for some three years—through two grand juries—attempting to get an indictment and subsequent conviction. Therefore, it is astonishing that in that length of time, this fallacy went unnoticed.

During the appeal to the Fifth Circuit, new counsel were retained and the discrepancy was discovered. The Fifth Circuit, however, failed to address the question presented and affirmed the decision of the District Court.

Defendant Tamargo therefore petitions this court to exercise its supervisory powers by reviewing the decision of the Fifth Circuit because the decision in this case forms a gross departure from the accepted and usual course of judicial proceedings.

The wrongs done to Defendant Tamargo must be corrected. This Petition for Writ of Certiorari is the last chance for remedy of the obvious injustice of allowing the Government to unduly prejudice the witnesses, jury and Court by espousing invalid requirements. Defendant Tamargo thereby petitions this Court to make a finding that because invalid training standards were utilized by the Government, undue prejudice did occur, that the trial was patently unfair, and that the judgment must be vacated and remanded for a new trial based upon the proper and applicable training standards.

That the training standard promulgated under the MDTA was invalidated by the passage of CETA is not a distinction without a difference. Rather, it is a distinction between laws that is crucial. The crucial nature of this difference may be demonstrated in three ways:

First, a comparison of the statutes shows:

In the 1962 Congressional Statement of Findings and Purpose (42 U.S.C. §2571, 1965. [Copy appended as Appendix J, *Infra.*]), MDTA was initiated to fill the "need for more and better trained personnel in many vital occupational categories, including professional, scientific, technical, and apprenticeable categories...."

The 1973 Congressional Statement of Purpose for CETA (29 U.S.C. 801, 1973. [Copy appended as Appendix H, *Infra.*]) proves that CETA had an entirely different focus. Specifically, its purpose was to "provide job training and employment opportunities for *economically disadvantaged, unemployed and underemployed* persons, and to assure that training and other services lead to maximum employment opportunities and enhance self-sufficiency by *establishing a flexible* and decentralized *system* of Federal, State, and local programs."

MDTA provided, with regard to OJT, in 42 U.S.C. §2584(a) (Copy appended as Appendix K, *Infra.*), a categorical statement of some length.

CETA enacted in 1973, on the other hand, provided, with regard to OJT, in 29 U.S.C. §811(4) (Copy appended as Appendix I), not a categorical statement, but the broad, simple term, "training on the job."

With regard to training standards, MDTA provided a highly structured and detailed description in 42 U.S.C. §2584(b).

1973 CETA provided no specific OJT training standards at all, but rather, provided the standards for all its various programs under one catch-all provision, 29 U.S.C. §983.

It is obvious from this review, that the basic premises of the two acts (MDTA and CETA) were drastically different. They were not intended for the same purposes, and consequently, they did not have the same strictures and requirements. It is clear that Congress repealed MDTA and enacted a new and totally different Act (CETA) because the old one (MDTA) was not working. Certainly, to require Tamargo to meet the requirements of MDTA after it had already been repealed, and even though he was funded under CETA, is patently unfair and unjust.

Second, the highly structured categorical approach of MDTA was further exemplified by the regulations implementing its MDTA-OJT program; e.g., 29 C.F.R. 20.20 (See Appendix D), with its myriad of details.

The contrasting broad simple approach, on the other hand, was exemplified by the regulation implementing the CETA-OJT; viz., 29 C.F.R. 95.33(d)(2)(i), 1974 (See Appendix E),

which essentially provided for demonstration and practice on a "hire first, train later" basis.

Third, this major contrariety of a detailed, categorized approach in MDTA, on the one hand, and the broad, flexible approach in CETA, on the other hand, is no mere semantical accident. Indeed, it was indicative of the specific intent of the Congress. Illustratively, accompanying P.L. 93-203 was H.R. Rep. No. 93-659, 93rd Cong., 1st Sess., *reprinted in* [1973] *U. S. Code Cong. & Ad. News*, 2935, which proposed the comprehensive reform of the MDTA legislation. The reasons for the reform were two-fold, one being over-centralization, and the other, which is important here, was the highly categorical nature of the program. In its place, the Committee recommended the passage of a manpower program which would be more responsive to local needs. The new legislation (CETA) was seen as meeting the goal of making manpower programs more "flexible to meet the widely differing situations around the country and the widely differing needs of individuals." *Id.* at 2936.

It is clear that, from the evidence in this case, the Government's reliance and repeated confusion of the jury on the MDTA training standard of "continuous and timely job instruction" was misguided, deceptive, and wrong.

The correct training standard, as evidenced by the statutes, regulations, Congressional reports, and prosecution and defense testimony, is that of "demonstration and practice."

Even under the most rigid interpretation of the "demonstration and practice" requirement, the facts of this case show that Spigrin CETA-sponsored employees met the requirement.

The term "Demonstration and Practice" was originally coined by the Congress to describe a far more flexible training form than that provided for under the MDTA. *See:* H. R. Rep.

No. 93-659, 93rd Cong., 1st Sess., *reprinted* in (1973) *U.S. Code Cong. & Ad. News*. At the trial before the District Court, a representative of the Hillsborough County Employment and Training Department, stated that the Demonstration and Practice requirement could be legally satisfied by a relatively short demonstration period; i.e., thirty to forty minutes, and subsequent practice of those demonstrated duties. Even the Government's own witness, Emory B. Everette from the Department of Labor stated that demonstration and practice meant the training standard was satisfied by someone "showing them (the CETA-sponsored employees) how to do the practice." There is absolutely no question, under the facts of this case, that the CETA-sponsored employees working for Spigrin, Inc., were subjected to the requirements of demonstration and practice. Realistically, it is totally impossible to hire an individual to work in a bar (any type bar) with no initial instruction. And it is inconceivable that one could conclude from the record that Tamargo turned over his business (and responsibility for cash receipts) to a totally ignorant person.

There were numerous references in testimony provided by Government witnesses to initially working in the warehouse, riding around with Clarence, the supervisor, being transferred to the training bar, and subsequent movement into a bar of their own (all activities which were used to familiarize the CETA-sponsored employee prior to his actually taking over the job). These very same people, however, would respond upon direct questioning that "no training was given"—an indication of their obvious confusion as to what standard of training was required.

By failing to address or even comment on the basic distinction between the CETA requirement of demonstration and practice and the MDTA requirement of continuous and timely job instruction, the Fifth Circuit impliedly interpreted the CETA statute as requiring the more stringent training standard.

This interpretation cannot stand because it is in direct contravention to the will of Congress as set forth, not only in the Comprehensive Employment and Training Act itself, but also a specific House Report. Except for the 5th Circuit's implicit decision in this case, there is no case law on the training standard requirements of CETA. Therefore, Defendant Tamargo petitions this Court to grant a Writ of Certiorari to settle the important federal question, and a matter of great justice to this Defendant, of what training standard should be applied to CETA.

A review of the decision of the Fifth Circuit indicates confusion as to the requirements of CETA. Specifically, the Fifth Circuit affirmed Tamargo's conviction, based upon the premise that:

> Tamargo knew either that no training was needed, *in the usual sense of the word*, or not more than a few hours of training could be used for making a person eligible to be employed full time as . . . a bar manager. (Emphasis added). *United States v. Tamargo*, at 350.

It is clear from this passage that the Fifth Circuit has committed the same error as the Defense Counsel and Court in the District Court case. While the 5th Circuit assumed that CETA required some sort of structured training program, this, in fact, is not the case. The CETA program was a retreat from the structured categorical requirements of MDTA.

The Fifth Circuit, in its statement of facts, placed substantial emphasis on the training procedures used by Mr. O'Steen, the previous owner of the bars. *United States v. Tamargo* at 348-349. In fact, several paragraphs are dedicated to a description of the inventory system. *Id.* Therefore, common sense and the record support the conclusion that some type of instruction and guidance must have occurred—and such instruction, with subsequent work experience, is sufficient to meet the test of "Demonstration and Practice" and, thereby, nullify this conviction.

Indeed, the Fifth Circuit has indicated that some instruction was given by the wording of its opinion:

> "Tamargo knew either that no training was needed, *in the usual sense of the word*, or not more than a few hours of training could be used...." *Id.* at 350.

Evidently the 5th Circuit was also trapped by the Government's false contention that formalized, classroom-type, training—the type required under the old MDTA provisions—was required under CETA. Clearly, the phrase, "no training was needed, in the usual sense of the word," is indicative that a more formalized training activity was envisioned by the Fifth Circuit. That, however, was not and is not factually and legally required by CETA.

Finally, Defendant Tamargo petitions this Court for Writ of Certiorari to remedy the errors committed by the Department of Justice in pursuing this conviction on an erroneous premise and the United States Court of Appeals for the Fifth Circuit in attempting to engage in judicial legislation.

The Government, in its zest to convict, and the original defense counsel, in their haste, committed an inexplicable error by overlooking the fact that the supposed violation of the training requirement for which Defendant Tamargo was being tried was totally invalid. A conviction rendered in a trial based wholly on such an erroneous premise is wrong—it is unjust—and it cannot be allowed to stand. The Fifth Circuit compounded this error not only by not disagreeing with the Government's trial premise but also by impliedly placing an incorrect interpretation on the CETA legislation. For this Court to allow a conviction, based on these two errors, which resulted from reliance on the more rigid regulations associated with a repealed federal statute, would be to set a precedent which could only be described as unconscionably outrageous.

Conclusion

The refusal of the Fifth Circuit Court of Appeals to remedy the undue prejudices occuring as a result of the Government's blatant misstatement of the requirements of CETA must be overturned. On that basis, Defendant Tamargo petitions this Court to grant this Writ of Certiorari to determine the extent of the errors, and remedy same by vacating the judgment below and remanding for a new trial.

Respectfully submitted,

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Certificate of Service

I HEREBY CERTIFY that three true copies of the foregoing have been sent by First Class United States Mail to William C. Bryson, Esquire, Chief, and Joan M. Azrack, Esquire, Appellate Section, Criminal Division, Post Office Box 899, Ben Franklin Station, Washington, D.C., 20044; Gerald R. Herms, Esquire, 200 N. Pierce Street, Tampa, Florida, 33602; and Paul B. Johnson, Esquire, Post Office Box 3346, Tampa, Florida, 33601, this 1 day of ~~April~~ May, 1981.

/s/

JOHN R. LAWSON, JR., ESQUIRE

Appendix A

United States v. Tamargo, et al., 637 F.2d 346, (5th Cir. 1981)

NO. 80-5049

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RAY TAMARGO, LINDA GAIL BOWLING SCOTT and ANGEO CANNATA,
Defendants-Appellants.

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.
UNIT B

Feb. 17, 1981.

Defendants were convicted in the United States District Court for the Middle District of Florida, Ben Krentzman, J., of violating the federal mail fraud statute and misapplication of funds granted under the Comprehensive Employment and Training Act and one of the defendants was also convicted on two counts of making false statements to a federal agency, and they appealed. The Court of Appeals, Tuttle, Circuit Judge, held that: (1) in statute governing the misapplication of CETA funds, the term "willfully misapplies" was not unconstitutionally vague, and (2) evidence was sufficient to sustain defendants' convictions.

Affirmed.

1. Embezzlement 2

In statute governing misapplication of funds granted under the Comprehensive Employment and Training Act, the term "willfully misapplies" was not unconstitutionally vague. 18 U.S.C.A. § 665(a).

2. Embezzlement 48(1)

In prosecution for the misapplication of funds granted un-

der the Comprehensive Employment and Training Act, trial court properly charged the jury that "to misapply money or property means a willful conversion or taking of such money or property to one's own use and benefit or the use and benefit for another, with intent to defraud." 18 U.S.C.A. § 665(a).

3. Embezzlement 44(1)

Post Office 49(11)

Evidence that defendant, manager of company which owned "black bars," after consultation with director of Comprehensive Employment Training Act program, participated in scheme to cause federal funds, funneled through CETA, to pick up more than half of the payroll for bar manager positions, for which little or no training was needed, was sufficient to sustain his conviction for misapplication of funds granted under CETA and violation of federal mail fraud statute. 18 U.S.C.A. § 665(a).

4. Embezzlement 44(1)

Post Office 49(11)

Evidence that director of Comprehensive Employment and Training Act program knowingly participated in scheme to cause federal funds, funneled through CETA, to pick up more than half of payroll of company which owned "black bars" for bar manager positions, for which little or no training was needed, was sufficient to sustain his convictions for misapplication of funds granted under CETA and violation of federal mail fraud statute. 18 U.S.C.A. § 665(a).

5. Fraud 69(5)

Conviction under statute prohibiting the making of false statements to a federal agency requires proof that the defendant had the specific intent to make a false or fraudulent statement deliberately or at least with reckless disregard of the truth and with the purpose to avoid learning the truth. 18 U.S.C.A. § 1001.

6. Fraud 69(5)

Evidence that defendant in seeking certification under the Comprehensive Employment and Training Act for employment as an entry trainee as an accounting clerk failed to state that within a period of a few weeks previously she had already been working in the same capacity for which she was seeking certification was sufficient to sustain her conviction for making false statements to a federal agency. 18 U.S.C.A. § 1001.

Appeals from the United States District Court for the Middle District of Florida.

Before TUTTLE, GODBOLD and HILL, Circuit Judges.

TUTTLE, Circuit Judge:

This is an appeal from the conviction of the three appellants, each on several charges of violating the Federal Mail Fraud statute and for the misapplication of funds granted under the Comprehensive Employment and Training Act, in violation of 18 U.S.C. § 665(a). Appellant Bowling also appeals from her conviction on two counts of making false statements to a federal agency, in violation of 18 U.S.C. § 1001. The appellants were also charged with conspiracy to defraud the United States in violation of 18 U.S.C. § 371, but, the jury being unable to reach a unanimous verdict on that charge, the court declared a mistrial as to it.

The appellants present the following issues in their appeals here:

1. Whether the statute governing the misapplication of CETA funds, 18 U.S.C. 665, is constitutional.
2. Whether the evidence was sufficient to support the convictions of each of the appellants.
3. Whether the district court or the prosecutor improperly commented on appellant Bowling's failure to take the stand.
4. Whether the district court erroneously excluded a defense exhibit on hearsay grounds.
5. Whether the district court's instructions to the jury were erroneous.

I. STATEMENT OF THE CASE

A careful study of the record reveals that there was evidence from which the jury could find beyond a reasonable doubt the following facts:

Prior to June 1975, one Eugene O'Steen owned a group of 11 bars in Tampa. In June he sold them to a company named Spigrin, Inc. Nine of these bars were what were known and identified by the witnesses as "black bars" which, according to all of the testimony, had the peculiar characteristic of not selling mixed drinks. Instead, they served a primarily black clientele on a "package store" basis. That is, they sold beer, wine, and liquor by the bottle or in packages from which the drinks could then be poured by the purchaser at tables or at the bar. Purchasers who wished to concoct their own mixed drinks could obtain the necessary bottled ingredients from an icebox, together with such ice as they wished to take. At the time of the purchase, appellant Tamargo, an attorney, was a shareholder, an officer, and the operating manager of Spigrin. The corporation had four other shareholders, one of whom was Cesar Rodriguez, with whom appellant Cannata, had a business relationship.[1] At this time Cannata was the executive director of the Hillsborough-Tampa Comprehensive Employment Program (TCEP) which held the contract with the CETA officials to administer the federal funds for the county of Hillsborough and city of Tampa.

At the time of the sale, O'Steen had a manager and several barmaids in each bar. Initially, he went through the operation with each new manager he hired so that the new employee would understand the sales and inventory system that was used. He would show the new employees how to work the cash register, how to check the cash register out, how to count the money, and how to keep the inventory. The operation of the

1. This relationship was described by Cannata in various terms but it is clear that it dealt with the operation of a "black neighborhood" bar which Cannata testified differed from the "black bars" in that patrons could buy mixed drinks. The relationship was that Cannata guaranteed to pay Rodriguez $1500 per month, but kept all of the proceeds in excess of that amount. He ran the bar and was present on almost a daily basis, although others operated it for him.

bars was "fairly simple." He could go through the entire procedure with a new employee in a single day. The nine "black bars" used what was known as a "perpetual inventory" system by which the items sold were replaced. The tag listing the brand name was placed on each bottle. When the bottle was sold the tag was taken off and placed on a metal spindle next to the cash register, so that these would show at the end of the day how much of each item had been sold. The beer and mixer inventory was kept according to the number of cases sold. At the end of each day, the quantities sold were calculated according to the number of tags on the spindle and depletion of beer and chaser boxes. The sales for the day were then recorded on a preprinted inventory sheet; then the tags, cash register tapes and the inventory sheets were sent daily to the main office. From there the tags and inventory sheets were sent to the warehouse where the inventories were then replenished according to the amount sold the previous day.

Shortly after the sale, Cannata's office suggested to the head of the recruitment program, one Didier, that he should approach Spigrin as a potential employer under the TCEP plan. After a short delay in the production of a contract with Spigrin, Cannata inquired about it, but was told that Didier's staff had had a difficult time reaching Tamargo. Thereupon, Tamargo showed up in Cannata's office where Mrs. Belliveau, having charge of the contract, negotiated with Tamargo in Cannata's presence for the original CETA authorization. This authorization consisted of an agreement by TCEP to pay 50 percent of the salaries of the "trainees" with a specified training period (here six weeks) for the three categories of employees, bar managers, accounting clerks and carpenters.[2]

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2. The written agreement was a negotiated contract between the recruiter and Spigrin. The funds were intended to defray the costs incurred by the employer in providing on-the-job training. *See* 29 C.F.R. 95.33(e)(2)(ii). The payments were to be used to offset "the costs of recruiting, training, and supporting services which are over and above those normally provided by the employer." 29 C.F.R. 95.33(d)(2)(ii). Direct subsidization of wages for trainees employed by private employers is prohibited. 29 C.F.R. 95.33(d)(2)(iii).

It was highly unusual for an employer contract to be prepared or negotiated in the executive director's office.[3]

At the time of the sale, O'Steen had used an employer named Ed Gilley to supervise the nine "black bars." Spigrin engaged Gilley to continue performing that same service. At about the time Gilley took over for Spigrin, Tamargo told him that the bars were not doing well financially and that they had to cut the payroll. He directed Gilley to fire most of the managers who had worked for O'Steen, and to replace them with managers hired through TCEP. Tamargo told Gilley that TCEP would be paying one-half the managers' salaries. He did not tell Gilley that the new employees were to be trained or that TCEP was a training program. He did not give Gilley any instructions for establishing supervision for the trainees. Thereafter, any applicant for employment was referred by Gilley to TCEP. They were then referred back to Spigrin as trainees. Gilley would brief the new employees on the bar operation and then leave them to begin work managing Spigrin bars by themselves, without any person being present either to supervise or train them. Gilley never trained anyone. Spigrin referred several of the persons who were employed as managers to TCEP and TCEP referred them back to Spigrin as trainees. When they were assigned as "bar managers" they got from 10 minutes to one hour's instructions in the operation of the bar from Gilley, or from a barmaid, or from some other trainee. They received either no training whatever or no training more than the few minutes given them by Gilley. Thereafter, they had no regular contact with the Spigrin operation, except for an occasional visit by Gilley.

The same lack of training was apparent in the case of a "carpenter" trainee and an "accountant clerk" trainee subsequently hired by Tamargo. The carpenter, a man named Mathias, had previously fixed up a bar for Cesar Rodriguez; Tamargo had seen the work and was pleased with it and when Mathias applied to him for a job as carpenter, Tamargo indicated that he was willing to employ him because of the quality

3. The job developer testified that the Spigrin contract was the only one she had ever seen prepared there and Cannata himself testified that it was "highly unusual" for this to be done.

of the carpentering that he had seen done by Mathias. Thereafter, he did remodeling work at the Spigrin bars. He had no training and no supervision.

Linda Bowling showed up at TCEP to apply for a job training certification to work for Spigrin as an "accounting clerk." Linda Bowling had been a secretary to Cannata who was then director of TCEP, for about a year some five years previous to this occurrence. She went to work in May, 1975 for Spigrin, at which time Tamargo sent her to the O'Steen offices to familiarize herself with the O'Steen business operations before they were taken over by Spigrin. She worked under O'Steen's bookkeeper, whom Tamargo had asked to show Bowling the bookkeeping, payroll, and accounting systems. She worked there for approximately one month before the sale was completed. Upon completion of the sale, the O'Steen bookkeeper's daughter who had been working there also, joined the Spigrin staff as an accountant clerk, not under the TCEP program. Shortly thereafter, Bowling made her appearance seeking TCEP approval for a job. After discussion with Cannata, Didier decided that Bowling was eligible for a training job as "accounting clerk." She started work on July 23 as head of the Spigrin office, receiving no further training from anyone and reporting to no one other than Tamargo, as the owner of the business. There was no one employed by Spigrin who either purported to, or actually did, give her any training.

In making application for the job with TCEP, Bowling signed two documents in connection with her application, on one of which she stated that she had been unemployed for 20 weeks, with the last date of employment on March 25, 1975, and on the other of which she stated that her last employer had been the Hillsborough County Museum, where she had served as public relations director. She made no reference to her prior employment with Spigrin, the company for which she had just received a month's training under the former owner.

Shortly after the beginning of the six weeks period, Tamargo approached Didier requesting an extension of the subsidized training periods from six weeks to six months. Tamargo said that the extension was necessary to complete the

training of the individuals hired under the contract. Didier compromised at 20 weeks. He asked Tamargo whether training was in fact being provided; he was assured that it was, and Tamargo told him that the accounting clerk trainee, appellant Bowling, was being trained by an accountant. Didier then spoke to Cannata about the request for an extension and the latter told him to go ahead if Didier thought the extension was "feasible." Thereupon, an amended contract specifying a training period of 20 weeks for bar managers and accounting clerks and 16 weeks for carpenters was approved.

One of Bowling's duties as office supervisor when she went back to work for Spigrin was to distribute and collect the time sheets filled out by the TCEP trainees, listing the hours they worked. These served as billing invoices for payment of TCEP funds for the training costs incurred. Tamargo signed and sent the invoices to TCEP listing for each trainee the hours they were employed per month by Spigrin. When they were received at TCEP, Cannata approved the amounts listed for payment of CETA funds. On the basis of this certification, checks were made out and paid to Spigrin, using the United States mails.

II. CONSTITUTIONALITY OF TITLE 18 665(a) AS APPLIED

[1] Appellants Cannata and Bowling contend that § 665(a) is unconstitutional as applied to them because nowhere within the Act does the statute define the term "willfully misapplies." They cite no case in support of this argument. We are satisfied from this Court's earlier decisions construing the terms "misapply" under other statutes that the prohibition is couched in language that cannot successfully be attacked on vagueness grounds. *United States v. Mann*, 517 F.2d 259 (5th Cir. 1975); *United States v. Wilson*, 500 F.2d 715, 720 (5th Cir. 1974) (both misapplication of bank's fund charges.)

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4. This Section provides as follows:
Theft or embezzlement from employment and training funds: improper inducement: obstruction of investigations
(a) Whoever, being an officer, director, agent, or employee of, or connected in any capacity with any agency receiving financial assistance under the Comprehensive Employment and Training Act knowingly hires an ineligible individual or individuals, embezzles, willfully misapplies, steals, or obtains by fraud any of the monies, funds, assets, or property which are the subject of the grant or contract of assistance pursuant to such Act shall be fined not more than, etc.

[2] The trial court here properly charged the jury "to misapply money or property means a willful conversion or taking of such money or property to one's own use and benefit or the use and benefit for another, with intent to defraud." This instruction is consistent with this Court's language in the cited cases.

III. SUFFICIENCY OF THE EVIDENCE

(a) *As to Tamargo:*

[3] The facts as recited above leave little doubt as to the presence in the record of more than adequate evidence from which a jury could find Tamargo guilty beyond a reasonable doubt. It is evident that after consultation with the local director of the CETA program, he instituted a course of action which the jury could find was intended to cause the federal funds, funneled through CETA, to pick up more than half of his new payroll for most if not all of the managers of his nine "black" bars. Moreover, the jury could find that Tamargo knew either that no training was needed, in the usual sense of the word, or not more than a few hours of training could be used for making a person eligible to be employed full time as such a bar manager.

Finally, even though some training had been necessary, there was more than ample evidence from which the jury could find that absolutely none was given to the CETA trainees employed by Spigrin. As to the one or two employees who apparently worked in bars that required a little more knowledge than the others, the record discloses that they were hired because of their previous training and experience and they were thus not properly eligible as entry level trainees.

(b) *As to Cannata:*

[4] Cannata took the witness stand and, contrary to the testimony of half a dozen other witnesses, made the astounding statement that it would take five years to qualify as a bar manager. He also denied knowing much about the operation of the "black" bars. However, the jury could, and it apparently did, believe Didier's testimony to the effect that Cannata told him:

> [H]e had—he had worked on (sic) the black bar and naturally, was telling me that it can be—there are not that many black people that might be involved in managing bars, because many of them are owned sometimes by others than blacks and are managing. It would be a good opportunity for many of our clients—our clients. We work with a lot of black individuals.

Moreover, even though the jury should not accept the suggested difference between "black" bars and "neighborhood black" bars which Cannata in other testimony attempted to magnify, the jury may well have believed that even at the "neighborhood black" bars a maximum of a few days of training was all that was required. This was testified to by Jerome Thomas who managed Leonard's Bar which is the one which Cannata owned and operated jointly with the Spigrin stockholder. Thomas testified that his training at Leonard's was from one to one and a half days or up to a week.

Although Cannata had testified that he knew nothing of the "black bars" which Tamargo was buying, he himself testified: "I told him [Didier] that they primarily—it was a bar business, that it concerned some black bars in the neighborhood."

Inferences that could reasonably be drawn from the fact that the recruiter, Mrs. Bellivueau, was brought into Cannata's office and introduced by him to Tamargo as a person who was interested in working out a contract and that the contract that resulted was the work of a "joint conversation" between her, Tamargo, and Cannata would fully warrant the jury's concluding that Cannata knowingly participated in the scheme to funnel funds into Tamargo's business for improper purposes. The preparation and approval of vouchers thereafter representing such funds and the mailing of them was the subject of the other counts on which Cannata was convicted. The jury verdicts here were also amply supported by the record.

(c) *As to Bowling:*

[5, 6] Bowling does not contend that the evidence was insufficient to sustain her conviction on Counts Four through

Fifteen, asserting only that the evidence was insufficient to warrant her conviction under the § 1001 counts, Counts Two and Three of the indictment. Appellant correctly states that a conviction under § 1001 requires proof that the defendant had the specific intent to make a false or fraudulent statement deliberately or at least with reckless disregard of the truth and with the purpose to avoid learning the truth. *See United States v. Lange*, 528 F.2d 1280 (5th Cir. 1976). However, citing no cases as a basis of comparison, appellant is content with an argument that "the jury could not reasonably have concluded that the evidence and reasonable inferences drawn from it establishes Bowling's intent to deceive beyond a reasonable doubt." She argues, in effect, that when Bowling failed to state that within a period of a few weeks previously she had already been working at the Spigrin office in the same capacity for which she was now seeking certification as an entry employee for training to fill the job the documents were intended only to give evidence of her previous experience, and that knowledge of this fact of her prior employment would have been immaterial to the TCEP officials. To the contrary, we think it quite likely that the jury did infer, as it could from the omission of this information, that Bowling's application for employment as an entry trainee as an accounting clerk was approved, whereas otherwise it might well have been rejected. In point of fact, appellant's brief acknowledges that if the application form had truthfully stated the facts, her former Spigrin employment "would be just one factor to be considered in her overall qualifications." This clearly indicates that the omission was material to the official's consideration of her application.

We conclude that the evidence was sufficient to permit a jury to conclude beyond a reasonable doubt that the omission was intentional and made for the purpose of deceiving TCEP officials.

IV. OTHER GROUNDS OF APPEAL

We have carefully considered the other grounds of appeal asserted by the several appellants, *i. e.*, mistaken statement by the trial court: "You can ask her" when a male witness was on the stand, as improperly calling attention to the later failure of the appellant Bowling to take the stand; the court's charge to the jury dealing with a conspiracy, which charge was dismissed by the court; and exclusion by the court of documents offered by the defendants under the Business Records Exception to the Hearsay Rule, Rule 803, Federal Rules of Evidence.

We conclude that the court's disposition of each of these grounds of appeal was correct. The judgments are AFFIRMED.

Appendix B

Judgment and Probation/Commitment Order by United States District Court for Middle District of Florida, Tampa Division. 1-18-80

UNITED STATES DISTRICT COURT
for Middle District of Florida — Tampa Division
Docket No. 79-79-Cr. T-K

UNITED STATES OF AMERICA,
Defendant,
vs.
RAY TAMARGO

Judgment and Probation/Commitment Order

In the presence of the attorney for the government the defendant appeared in person on this date, month 1, day 18, year 80. However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel. With Counsel Manuel M. Garcia.

Not Guilty

There being a verdict of Guilty.

Defendant has been convicted as charged of the offense(s) of devising a scheme to defraud by use of the mails and misapplications of government funds, in violation of Title 18, Sections 2, 665(a) and 1341, U.S.C.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Three Years in each of counts 4, 5, 6, 7, 8 & 9 and One Year in each of counts 10, 11, 12, 13, 14 & 15. The sentences imposed in each of counts 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 & 15 shall run concurrently with the sentence imposed in count 4, or until the defendant is otherwise discharged as provided by law.

Filed Clerk, U.S. District Court, Jan. 22, 3:42 PM '80,
Middle District of Florida, Tampa, Florida.

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at sometime during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends, Federal Prison Camp, Eglin Air Force Base, Florida. It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

Signed By U.S. of Judge Ben Krentzman Date 1-18-80

MICROFILMED - ROLL NO. 77-399

Appendix C

MDTA-OJT Proposal-Short Form for Negotiated Fixed Price Contracts and Subcontracts

Budget Bureau No. 44R1337.1 (Expires 6/30/69)

Rec'd 12/4/75

USBH Form OJT-3A (Revised)

Redevelopment Area ( )

Contract No. 081

MOTA OJT PROPOSAL-SHORT FORM

Team #03

FOR NEGOTIATED FIXED PRICE* CONTRACTS AND SUBCONTRACTS

A. Proposal To:

Board of County Commissioners of
Hillsborough County
Hillsborough/Tampa Comprehensive
Employment Program

Authorized Representative
Name Norbert Didier
Address 112 E. Cass Street
Tampa, Florida

B. From:

Spigrin Inc.
1709 W. Carmen
Tampa, Florida

Authorized Representative
Name Ray Tamargo
Address 1709 W. Carmen
Tampa, Florida

I. a. Proposed OJT Training Dates: Beginning December 1, 1975 Completion September 30, 1976

b. Total Number of Employees 50

c. Total Number of Trainees 6

d. Number of Trainees to be selected from Unemployed (6)

e. Products or Services Liquor & Package Liquor

f. SIC Code

II. Training Program Data

Occupation and DOT Code	Training Purposes**	No. of Trainees	Trainee Work Week Hours	Trainee Progressive Wage Rates: Per Hour	Trainee Progressive Wage Rates: No. of Weeks	Total Training Weeks per Trainee	Weekly Payment Rate to Facility Per Trainee	Total Trainee Weeks	Total Payment to Facility
1	2	3	4	5		6	7.	8	9
312.878 Bar Attendant	E	6	40	$1.60	4	4	$32.00	24	$768.00
								10. GRAND TOTAL $	768.00

**Code (E) Entry (UG) Upgrading (A) Approp. (O) Other

11. Establish wage rate upon completion of training $ 1.80 per hour + tips

III. Payment Schedule: ☐ 90 days ☒ Completion every 30 days

Progress Reports: a. First Report within 15 days after start of project. b. Subsequent Reports every (30) days.

c. Final Report at completion.

IV. a. Proposer will employ and train 6 trainees, on premises described herein in Item V, for the periods and occupations and at the wage rates stated, and will furnish and perform continuous and timely job instruction for such trainees by a qualified instructor for the respective occupations shown. Proposer will supply all necessary supplies, equipment, materials, clerical and all other services required for satisfactory training, and will comply with all the job training requirements and provisions set forth in the items of this Proposal, and will make arrangements with the local Employment Service Office for the preparation of trainee entry forms prior to applicant trainee's entry into training.

b. Proposer will provide Workmen's Compensation protection for all trainees, or accident and liability insurance coverage to an extent equal to such protection.

c. Proposer may employ a new trainee in substitution of a terminated trainee within the first 4 training weeks of said terminated trainee's program, or within such weeks constituting ¼ of the total training program of the replaced trainee, whichever period is lesser. The substitute trainee will be furnished OJT training under the terms of this Proposal for the remainder of said terminated trainee's original training period.

*In cost basis Negotiated fixed fees refers to the unit price per trainee per week. Actual payment will be based on trainee weeks and negotiated unit price as described in the OJT 3A proposal.

V Location of Training Facility and Person in Charge of OJT:

Ray Tamargo - 1709 W. Carmen - Tampa, Florida

VI Major Items, and Number of Proposer's OJT Equipment to be used in Training:

VII OJT Training Outline and time-Schedule for Each Occupation: (add sheets as needed):

Serves alcoholic drinks to patrons in neighborgood taverns or combination bar and package-good store: Takes orders from customers. Serves shots (jigglers) for consumption within establishment. Serves bottled beer or draws draught beer from kegs. Sells unopened bottles of alcoholic and nonalcoholic beverages to be taken from premises when licensed for sale of package goods. Receives payment for amount of sale and makes change. Usually does not serve miced drinks.	Total Hours: 960

VIII Program Corrective:

Proposer assures that he will fully comply with all C.E.T.A. regulations, certify trainee placement and terminations, and properly complete and sign trainee time forms.

IX. Representation Concerning Contingent Fees: Proposer represents: (a) that he [ ] has, [X] has not, employed or retained any company or person (other than a full-time bona fide employee working solely for the proposer) to solicit or secure this contract, and (b) that he [ ] has [X] has not, paid or agreed to pay any company or person (other than a full-time bona fide employee working solely for the proposer) any fee, commission, percentage, or brokerage fee, contingent upon or resulting from the award of this contract and agrees to furnish information relating to (a) and (b) above as requested by the Contracting Officer.

X. Certification When Required:

a. The undersigned representative of the collective bargaining agency concur in this proposal.

AGENCY No Collecting Bargaining Agency involved

Signature Title Date

b. 1. A legitimate need for training and reasonable expectation of employment for persons completing training in the occupation(s) listed in this proposal have been established by the State Employment Service.

Job Developer 12/5/75

Authorized Representative Title Date

b.2. Date of Prior E.S. Approval:

c. Labor Market Area:

PROPOSER: Spigrin Inc.

BY Ray Tamargo

Signature

Mgr.

Title

XI. The undersigned certifies that the training plan is adequate... The negotiated price, terms and conditions are consistent with MDTA regulations and policy and recommends approval of the proposal.

for Hillsborough/Tampa Comprehensive Employment

Agency

Training and Job Experience Manager

Title Date

Subcontract Training Plan Approved By Authorized BAT Representative

Title Date

OJT 85 (b) 4/72

Appendix D

29 C.F.R. 20.20, 1967

1. 29 C.F.R. 20.20, 1967: MDTA Standard

§20.20. *Standards for on-the-job training* On-the-job training, as used in this part, refers to a program of occupational training which uses instruction combined with work to qualify a trainee for a particular occupation. Such programs shall:

(a) Have the objective of teaching the basic needs requisite for satisfactory performance in the occupation for which the training is given;

(b) Require that the trainee devote his time principally to training where the payment of allowances is contemplated;

(c) Provide methods of instruction, scheduling of sessions, progression of trainees, size of the training class or group, which shall meet the approval of the Secretary, and be comparable in duration to training programs for the particular occupation, and adequate in content to qualify trainees for employment;

(d) Provide adequate and safe facilities and equipment, qualified instructors, and other personnel;

(e) Require that suitable records of attendance, performance and progress of trainees be maintained and that such records be made available to the Secretary, when so requested;

(f) Provide that upon request the trainee shall be given an opportunity to be heard and reconsideration or review of any certification made which terminates him from training absent good cause; and

(g) Provide that for hours spent in production of any goods or services the rate of compensation to be paid to trainees by employers shall be specified in a written agreement entered into by the training facility and the Secretary.

Appendix E

29 C.F.R. 95.33(d)(2)(i)

2. 29 C.F.R. 95.33(d)(2)(i): CETA Standard

§95.33(d)(2). *On-the-job training.* (i) On-the-job training (OJT) refers to training conducted in a work environment designed to enable individuals to learn a bonafide skill and/or qualify for a particular occupation through demonstration and practice. Such training may be conducted on a "hire first, train later" basis, or with ultimate placement with an employer other than the training organization. OJT may involve individuals at the entry level of employment or be used to upgrade present employees into occupations requiring higher skills. Training shall be designed to lead to the maximum development of participants' potentials and to their economic self-sufficiency.

Appendix F

18 U.S.C. §§2 (1951) and 1341 (1970)

3. 18 U.S.C. §§2 (1951) and 1341 (1970):

§2. *Principals.*

(a) Whoever commits an offense against United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

§1341. *Frauds and swindles.* Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Appendix G

18 U.S.C. §665(a) (1948)

4. 18 U.S.C. §665(a) (1948):

> §665. *Theft or embezzlement from employment and training funds: improper inducement: obstruction of investigation.*
>
> (a) Whoever, being an officer, director, agent, or employee of, or connected in any capacity with any agency receiving financial assistance under the Comprehensive Employment and Training Act knowingly hires an ineligible individual or individuals, embezzles, willfully misapplies, steals, or obtains by fraud any of the moneys, funds, assets, or property which are the subject of a grant or contract of assistance pursuant to which are the subject of a grant or contract of assistance pursuant to such Act shall be fined not more than $10,000 or imprisoned for not more than 2 years, or both; but if the amount so embezzled, misapplied, stolen, or obtained by fraud does not exceed $100, such person shall be fined not more than $1,000 or imprisoned not more than 1 year, or both.

Appendix H

29 U.S.C. §801 (1978)

5. 29 U.S.C. §801 (1978): CETA

§801. *Congressional statement of purpose.* It is the purpose of this chapter to provide job training and employment opportunities for economically disadvantaged, unemployed, or underemployed persons which will result in an increase in their earned income, and to assure that training and other services lead to maximum employment opportunities and enhance self-sufficiency by establishing a flexible, coordinated, and decentralized system of Federal, State, and local programs. It is further the purpose of this chapter to provide for the maximum feasible coordination of plans, programs, and activities under this chapter with economic development, community development, and related activities, such as vocational education, vocational rehabilitation, public assistance, self-employment training, and social service programs.

Appendix I

29 U.S.C. §811(4) (1973)

6. 29 U.S.C. §811(4) (1973): CETA

§811. *Program description.* It is the purpose of this subchapter to establish a program to provide comprehensive manpower services throughout the Nation. Such program shall include the development and creation of job opportunities and the training, education, and other services needed to enable individuals to secure and retain employment at their maximum capacity. Comprehensive manpower services may include, but shall not be limited to, programs and activities designed to carry out the purpose of this subchapter, such as—

(4) Training on the job.

Appendix J

42 U.S.C. §2571 (1965)

7. 42 U.S.C. §2571 (1965): MDTA

§2571. *Congressional statement of findings and purpose.* The Congress finds that there is a critical need for more and better trained personnel in many vital occupational categories, including professional, scientific, technical, and apprenticeable categories; that even in periods of high unemployment, many employment opportunities remain unfilled because of the shortages of qualified personnel; and that it is in the national interest that current and prospective manpower shortages be identified and that persons who can be qualified for these positions through education and training be sought out and trained as quickly as is reasonably possible, in order that the Nation may meet the staffing requirements of the struggle for freedom. The Congress further finds that the skills of many persons have been rendered obsolete by dislocations in the economy arising from automation or other technological developments, foreign competition, relocation of industry, shifts in market demands, and other changes in the structure of the economy; that Government leadership is necessary to insure that the benefits of automation do not become burdens of widespread unemployment; that the problem of assuring sufficient employment opportunities will be compounded by the extra-ordinarily rapid growth of the labor force in the next decade, particularly by the entrance of young people into the labor force, that improved planning and expanded efforts will be required to assure that men, women, and young people will be trained and available to meet shifting employment needs; that many persons now unemployed or underemployed, in order to become qualified for reemployment or full employment must be assisted in providing themselves with skills which are or will be in demand in the labor market; that the skills of many persons

now employed are inadequate to enable them to make their maximum contribution to the Nation's economy; and that it is in the national interest that the opportunity to acquire new skills be afforded to these people with the least delay in order to alleviate the hardships of unemployment, reduce the costs of unemployment compensation and public assistance, and to increase the Nation's productivity and its capacity to meet the requirements of the space age. The Congress further finds that many professional employees who have become unemployed because of the specialized nature of their previous employment are in need of brief refresher of reorientation educational courses in order to become qualified for other employment in their professions, where such training would further the purposes of this chapter. It is therefore the purpose of this chapter to require the Federal Government to appraise the manpower requirements and resources of the Nation, and to develop and apply the information and methods needed to deal with the problems of unemployment resulting from automation and technological changes and other types of persistent unemployment.

Appendix K

42 U.S.C. §2584(a) and (b) (1962)

8. 42 U.S.C. §2584(a) and (b) (1962): MDTA

§2584. *On-the-job training—Encouragement, development, and adoption of programs.*

(a) The Secretary of Labor shall encourage, develop, and secure the adoption of programs for on-the-job training needed to equip persons selected for training with the appropriate skills. The Secretary shall, to the maximum extent possible, secure the adoption by the States and by private and public agencies, employers, trade associations, labor organizations and other industrial and community groups which he determines are qualified to conduct effective training programs under this subchapter of such programs as he approves, and for this purpose he is authorized to enter into appropriate agreements with them: *Provided*, That the Secretary shall not refuse to receive for consideration any application from an applicant who desires to conduct a training program under this part.

Training Standards

(b) In adopting or approving any training program under this part, and as a condition to the expenditure of funds for any such program, the Secretary shall make such arrangements as he deems necessary to insure adherence to appropriate training standards, including assurances—

(1) That the training content of the program is adequate, involves reasonable progression, and will result in the qualification of trainees for suitable employment;

(2) that the training period is reasonable and consistent with periods customarily required for comparable training;

(3) that adequate and safe facilities, and adequate personnel and records of attendance and progress are provided; and

(4) that the trainees are compensated by the employer at such rates, including periodic increases, as may be deemed reasonable under regulations hereinafter authorized, considering such factors as industry, geographical region, and trainee proficiency.

Office-Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1980

RAY TAMARGO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the charges against him were improperly based on regulations that were no longer in effect at the time he engaged in the conduct for which he was prosecuted.

1. Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on six counts of mail fraud, in violation of 18 U.S.C. 1341, and six counts of misapplication of funds granted under the Comprehensive Employment and Training Act (CETA), in violation of 18 U.S.C. 665(a). He was sentenced to concurrent terms of three years' imprisonment on the mail fraud counts and one year's imprisonment on the misapplication counts. The court of appeals affirmed (Pet. App. A-1 to A-12).

The evidence at trial showed that petitioner obtained federal funds under the CETA program on the representation that the funds would be used to provide on-the-job training for unemployed or underemployed workers. Instead of providing such training, petitioner used the funds to defray the salary expenses of ordinary employees, a purpose expressly prohibited by the governing federal statute and by the contract between petitioner's corporation and the federal government.

Through that corporation, petitioner in 1975 purchased a group of bars in Tampa, Florida that were referred to colloquially as "black bars." They operated on a "package store" basis, selling liquor by the bottle to, primarily, black patrons who would consume it on the premises. "Black bar" employees performed relatively simple tasks such as operating a cash register, keeping inventory, and counting money. The evidence at trial showed that a new employee could be taught to operate one of the bars in a single day (Pet. App. A-4).

Shortly after his corporation purchased the bars, petitioner applied to serve as a sponsor for a CETA job-training program. Following negotiations, he entered into a contract with the local CETA agency, pursuant to which the agency agreed to pay petitioner's corporation a sum of money to defray its costs for providing six weeks of training to several employee-trainees. The contract amount was pegged at 50% of the salary paid by petitioner to the employees (Pet. App. A-5). Petitioner agreed in writing that his corporation would "employ and train" bar managers, accounting clerks, and carpenters during this period and would provide "continuous and timely job instruction * * * by a qualified instructor." He also agreed to comply with all

CETA regulations applicable to the job training program (Pet. App. A-16 to A-17).[1]

Shortly after negotiating the initial contract, petitioner arranged to have it modified to extend the training period to 20 weeks for bar managers and accounting clerks and 16 weeks for carpenters. During this extended period, CETA would continue to pay an amount equal to 50% of the employees' salaries. When asked if training was being provided to the employees, petitioner assured CETA officials that it was; he added that the extension was necessary to complete the employees' training (Pet. App. A-7 to A-8).

Contrary to petitioner's representations to the CETA agency, the evidence showed that the CETA-supported employees received little or no training.[2] Rather, petitioner used the CETA program as a source of subsidized unskilled labor, in direct contravention of the governing CETA regulations.[3] He replaced his regular employees with CETA

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[1]The contract reprinted in the appendix to the petition, while identical in form to the contracts described in the text, covered a later group of "trainees."

[2]The evidence showed that most of the CETA-supported employees who worked in petitioner's bars received from 10 minutes' to one hour's instruction in operating the establishments, after which they virtually were left on their own (Pet. App. A-6). The carpenter and accounting clerk were already experienced in their fields and received no training at all (Pet. App. A-6 to A-7).

[3]29 C.F.R. 95.33(d)(2) provides, in pertinent part:

> (ii) Prime sponsors may provide payments or other inducements to public or private employers for the bona fide training and related costs of enrolling individuals in the program: *Provided*, that payments to employers organized for profit are only made for the costs of recruiting, training and supportive services which are over and above those normally provided by the employer. Use of a formula which incorporates the trainee's wage as a factor and fixed unit cost contracting are acceptable methods of reimburse-

"trainees" in order, as he told one of the managers, to cut the payroll (Pet. App. A-6). He gave no instructions to any of his employees regarding training, and no training was provided. Each applicant for employment at one of petitioner's bars was sent first to CETA and then referred back to petitioner, so that petitioner's corporation could claim the CETA training reimbursement (*ibid.*). Invoices seeking reimbursement were sent by the corporation to the CETA agency through the United States mail.

2. Petitioner contends that his convictions were based not on the requirements of CETA, but on the requirements of a predecessor statute, the Manpower Development Training Act of 1962 (MDTA), 42 U.S.C. (1964 ed.) 2584, which was repealed prior to the conduct at issue in this case. That is so, argues petitioner (Pet. 7), because the contract he signed with the local CETA agency was drawn up on a form designed to reflect the detailed on-the-job training standards fixed by the MDTA and its implementing regulations rather than the more lenient standards of CETA. Therefore, concludes petitioner, he was in effect convicted of violating a repealed statute.

The short asnwer to petitioner's claim is that whether or not CETA (as distinct from the MDTA) required that he provide "continuous and timely job instruction * * * by a qualified instructor," petitioner agreed to do so in exchange for CETA funds. Furthermore, he agreed to comply with pertinent CETA regulations, including a regulation limiting the use of training funds to the costs of "recruiting, training and supportive services which are over and above those

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ment to private-for-profit employers for extraordinary training costs associated with providing on-the-job-training. * * *

(iii) Direct subsidization of wages for participants employed by private employers organized for profit is not an allowable expenditure (sec. 101(5)).

normally provided by the employer," and expressly prohibiting the use of training funds as wage subsidies.[4] After the training program supposedly had begun, petitioner assured CETA representatives that the contracted-for training in fact was being provided and, indeed, that an extension was needed in order to complete the task. However, as the evidence outlined above showed, that statement was false; petitioner did not provide, and had no intention of providing the agreed upon training, nor any training at all. Instead, he used the CETA funds for a clearly prohibited purpose—to subsidize his payroll. In so doing, petitioner breached his contract with CETA, violated CETA regulations, and made material misrepresentations to CETA officials. While this course of conduct quite probably would have violated the MDTA, it without doubt constituted a fraud upon the CETA program and a misallocation of CETA funds, the crimes of which petitioner properly stands convicted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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[4]The regulation does, however, permit private employers to use wages as a factor in determining the costs of (and, hence, the reimbursement for) training. See note 3, *supra*.